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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

CONNIE CUTINELLO, etc., *et al.*,

Petitioners,

v.

DOUGLAS L. WHITLEY, etc., *et al.*,

Respondents.

On Appeal From The Supreme Court Of
The State Of Illinois
There On Appeal From The
Circuit Court Of Cook County, Illinois

PETITION FOR WRIT OF CERTIORARI

Myron M. Cherry*
Cherry & Flynn
30 North LaSalle Street
Suite 2300
Chicago, Illinois 60602
(312) 372-2100

Robert L. Sklodowski
Sklodowski, Franklin, Puchalski
& Reimer
111 West Washington Street
Suite 1000
Chicago, Illinois 60602
(312) 201-8202

Lee J. Schwartz
30 North LaSalle Street
Suite 2300
Chicago, Illinois 60602
(312) 553-5050

Attorneys for Petitioners
* Counsel of Record

ORAL ARGUMENT REQUESTED

QUESTIONS PRESENTED

1. Does 55 *ILCS* 5/5-1035.1 of the State of Illinois, which authorizes only the Counties of Kane, DuPage and McHenry, by name, (and no other counties) to impose a motor fuel tax violate the equal protection clause?

2. Does the reliance of the Illinois Supreme Court on a mere conjecture violate the due process clause?

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PETITION FOR WRIT OF CERTIORARI

REPORT BELOW

Cutinello v. Whitley, 161 Ill.2d 409, 641 N.E.2nd 360 (1994). This case is set forth in full in the Appendix to this Petition.

JURISDICTION

a. The Illinois Supreme Court decided this case on May 19, 1994, and denied Plaintiffs' Petition for Rehearing on October 3, 1994.

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[1] **Plaintiffs-Petitioners** are Connie Cutinello, individually and on behalf of all others similarly situated; Carl Svoboda, individually and on behalf of all others similarly situated; Brent Christensen, individually and on behalf of all others similarly situated; Elgin West 76 Truck Stop, individually and on behalf of all others similarly situated; Hampshire Fuel Stop, Inc., individually and on behalf of all others similarly situated; Food and Fuel of Harvard, Inc., individually and on behalf of all others similarly situated; and Martin Oil Marketing, Ltd., individually and on behalf of all others similarly situated. **Defendants-Respondents** are Douglas L. Whitley, Director of the Illinois Department of Revenue, Dawn Clark Netsch, Comptroller of the State of Illinois, and Patrick Quinn, Treasurer of the State of Illinois. **Defendants-Respondents and Intervening Defendant-Respondent** are County of Kane, County of McHenry, and County of DuPage. References in the text to Defendants are references to the three counties.

b. This Court has jurisdiction under 28 U.S.C. 1257, authorizing this Court to review decisions of the highest court of a state finding a state statute valid against a federal constitutional challenge:

> Final judgments or decrees rendered by the highest court of a State in which a decision may be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn into question on the grounds of being repugnant to the Constitution . . . of the United States.

c. The Constitutional provisions involved are:

> Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S.Const., Am. XIV.

d. The state statute involved provides:

> The county board [sic] of the counties of DuPage, Kane and McHenry may, by an ordinance or resolution adopted by an affirmative vote of a majority of the members elected or appointed to the county board, impose a tax upon all persons engaged in the county in the business of selling motor fuel, as now or hereafter defined in the Motor Fuel Tax Law, at retail for the operation of motor vehicles upon public highways or for the operation of recreational watercraft upon waterways. . . . (Emphasis added.)

55 *ILCS* 5/5-1035.1.

STATEMENT OF THE CASE

In 1989, the Illinois General Assembly enacted P.A. 86-15 that, among other things, authorized the Counties of DuPage, Kane and McHenry Counties (by name) to impose a motor fuel tax of up to 4¢ per gallon. The three counties exercised their authority. Three purchasers of motor fuel (one in each county) and four service stations (at least one in each county) sued to have the local ordinances invalidated based on the alleged unconstitutionality of the authorizing

legislation on both state and federal constitutional grounds. The trial court preliminarily enjoined the distribution of the county motor fuel tax monies to the counties and then, upon further briefing, entered its permanent injunction against collection and distribution of the taxes. The trial court partly stayed its final order, allowing for the continued collection, but not distribution of the taxes, pending appeal.

The Illinois Supreme Court reversed the trial court, finding the authorizing legislation to be valid on both state and federal constitutional grounds. The Petition for Rehearing was denied and this Petition for Writ of Certiorari followed.

ARGUMENT

Connie Cutinello, etc., *et al.*, Plaintiffs-Petitioners ("Petitioners" or "Plaintiffs"), by their attorneys, petition this honorable Court for a writ of certiorari to the Illinois Supreme Court pursuant to 28 U.S.C. 1257.

INTRODUCTORY COMMENTS

The Illinois Supreme Court has taken a perfectly serviceable doctrine enunciated by this Court in evaluating equal protection challenges to legislation and turned it into an impenetrable wall, foreclosing perfectly valid attacks on flawed state legislation. In this case, the Illinois Supreme Court overturned a decision by a learned trial court judge who had invalidated 55 *ILCS* 5/5-1035.1 and ordinances passed under its authority. The Illinois Supreme Court held that a statute that granted three disparate counties, by name, and only those three counties (out of 102 counties in Illinois) power to tax motor fuel was not invalid under the Illinois special legislation ban and, therefore, also not invalid under the equal protection clauses of the state and federal constitutions, which are resolved under identical legal analyses.

Petitioners have no objection to the oft-repeated tenets (1) that there is a presumption of validity to legislation, (2) that a legislative body has broad discretion in creating classifications and (3) that there must be a reasonable basis for a legislative classification. Indeed, Petitioners suggested various classifications that would have been entirely valid. In this case, however, the equal protection clause was twisted so far by the Illinois Supreme Court that no legislation could ever be invalidated for violation of that clause. The presumption of validity is not a legislative doctrine of infallibility.

In addition, Petitioners' due process rights were held for naught when the Illinois Supreme Court relied on a factual assertion by Defendants to uphold the legislation when the factual predicate has twice been perfectly properly rejected by the trial court when that court had stricken the affidavit that contained the factual predicate. The Illinois Supreme Court, nevertheless, took as true the facts attached to the affidavit and held against the Petitioners for failing to disprove matters that had been disallowed.

As shown in greater detail below, this Court should hear this case so that it can review (and reverse) this thoroughly incorrect decision of the Illinois Supreme Court.

I.

THE ILLINOIS STATUTE VIOLATES EQUAL PROTECTION REQUIREMENTS

A. In General

The analysis by the Illinois Court makes it virtually impossible for a party to ever win an equal protection challenge to legislation. In its opinion, the Illinois Supreme Court states that its analysis is solely a question of law, but its decision is premised on a recitation of facts

that, so far as the record in this case is concerned, are simply a set of fictions. In particular, the Defendants twice proffered to the trial court an affidavit of a highway engineer that had charts stapled to it that were not even referenced in the affidavit. The charts purported to show population changes among some Illinois counties in the early and mid-1980s. Twice, the trial court refused to allow the affidavit into evidence, finding a total failure to comply with Illinois Supreme Court Rule 191. The Illinois Supreme Court did not overturn, nor did it even address, this totally correct ruling of the trial court. Instead, that Court turned a mere supposition, an intellectual what-if, into its basis for decision. The Counties of DuPage, Kane and McHenry could have been the slowest-growing, the most average, or the fastest growing counties of Illinois — or even one of each — during the 1980s. Yet if the Defendants merely suggest a possibility, it now becomes incumbent on the Plaintiffs (according to the Illinois Supreme Court) to prove all possible idle speculation to be false.

If, on the other hand, it is the Illinois Supreme Court's view that any speculation, even if idle or false, overcomes reality and may not be met with evidence as to the facts, then that Court's position implicates even greater due process concerns. *See Argument II* below. It would allow total falsehoods to prevail over truth, so long as someone could conceive that something is a fact (even if it is not). One could conceive that Chicago is the smallest city in Illinois — but it is not. One could conceive that Cook County is a rural county, but it is not.

The Illinois Supreme Court's opinion penalizes Plaintiffs for having successfully challenged the introduction of Defendants' purported

evidence. There being nothing before the trial court other than mere supposition, Plaintiffs did not try to disprove what had become literally a baseless speculation. Had Defendants said they were the three largest counties in Illinois on as little evidence (that is, none) as was before the trial court, would Plaintiffs have had the burden of disproving that falsehood? If this Court answers yes, then it should remand this case to allow Plaintiffs the appropriate opportunity.

The Illinois Supreme Court made no attempt to respond to Plaintiffs' initial argument that the legislature has made no classification at all; it simply had denominated three counties by name to be granted the privilege of imposing a motor fuel tax, in as clear a violation of the equal protection clause as there could be. Rather, that court, in an alchemical display of transforming lead to gold, found the hidden classification in the unproven assertion of the Defendants that these three counties share a special property, that of being the three fastest growing counties of Illinois (by percentage) during a 7-year period. Thus, the legislation is miraculously transmuted to read: "The county boards of the three fastest growing counties from 1980-87" may impose a county motor fuel tax. Not the three fastest growing counties for each prior seven years may thereafter impose the tax, but the three fastest growing counties for a 7-year period during the 1980's may <u>forever</u> impose a motor fuel tax even if other counties grow at faster rates, or even if all counties grow at faster rates. As Justice Charles Freeman properly pointed out in his dissent, "the classification here is an arbitrary distinction not founded upon any substantial difference of situation or condition . . . ." 161 Ill.2d at ___, 641 N.E.2d at 368.

The Illinois Supreme Court suggested that pure conjecture of what the legislature had in mind is sufficient to uphold a legislative classification, 161 Ill.2d at ___, 641 N.E.2d at 365. However, this Court need not enter into conjecture when the legislative history is quite clear as to why the legislature did what it did. As Plaintiffs point out below, other similar counties were excluded because their legislators wanted them excluded. And as Justice Freeman pointed out, the rationale for P.A. 86-16 is to enhance economic development through improved roadways. 161 Ill.2d at ___, 641 N.E.2d at 368. Further, as Plaintiffs point out below, the legislature had before it a report by the Illinois Department of Transportation, *Lifelines to the Economy*, that would have justified a subclass of counties to be given the motor fuel tax power, but not just DuPage, Kane and McHenry Counties. Courts should not rely on fictions when facts are not only readily obtainable but are provided to them. Indeed, except in cases like this, the thrust of modern American jurisprudence has been to encourage decisions based on fact, not on judicial fiction.

Petitioners agree with Justice Freeman and this Court that the equal protection clause allows some classification, but that it prohibits arbitrary legislative classifications. 161 Ill.2d at ___, 641 N.E.2d at 368. Petitioners have argued that there is no rational or substantial difference of situation or condition and there is no substantial difference of situation which can support this classification, and Justice Freeman is absolutely correct that "the basis for the distinction between the blessed counties and these which have not been included under the act . . . remains unsatisfied." *Id.* (emphasis added).

The Illinois Supreme Court relies on federal cases involving equal protection challenges to legislation. 161 Ill.2d at ___, 641 N.E.2d at 365, citing *Nordlinger v. Hahn*, 505 U.S. ___, 112 S.Ct. ___, 120 L.Ed.2d 1 (1992); *United States R.R. Retirement Board v. Fritz*, 449 U.S. 166, 101 S.Ct. 453, 61 L.Ed. 368 (1980); *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969); *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. ___ , 113 S.Ct. ___, 124 L.Ed.2d 211 (1993). The Illinois Supreme Court discussed none of the classifications that allowed this Court to uphold the challenged legislation there. In none of those cases was there merely a denomination of the "blessed" privileged ones by name. Nor was there a legislative history in those cases that spelled out the real reason for the classification (a reason that the Defendants here have never contravened). In short, the federal cases only serve as a starting point for analysis, not as a mantra to conclude or obviate analysis of the specific legislation involved.

The Illinois Supreme Court erred when it stated that Petitioners responded to the Defendants' argument by reanalyzing the data tendered by them (but rejected by the trial court). 161 Ill.2d at ___, 641 N.E.2d at 365. What Petitioners did do is point out that even if the data were allowed into evidence (which it was not), it did not prove what Defendants wanted to prove. *See* below. The Illinois Supreme Court not only rejected Petitioners' analysis, but, more importantly, it accepted Defendants' statistics as if they were true without having given Petitioners a chance to refute them.

In his dissent, Justice Freeman went to the core of the error made by the majority, the arbitrariness of the classification. Petitioners adopt

his discussion of the constitution, the cases and the facts to the extent they are known. Justice Freeman correctly notes that in legislation challenged in *Chicago National League Ball Club, Inc. v. Thompson*, 108 Ill.2d 357, 483 N.E.2d 1245 (1985), and *People ex rel. County of DuPage v. Smith*, 21 Ill.2d 572, 173 N.E.2d 485 (1961), the Illinois legislature respectively (1) drew a distinction among different sorts of sports facilities and (2) granted special authority to all the collar counties around Cook County, not just three of them. The difference between *Smith* and this case is particularly relevant. The growth of the collar counties and the similarity of their needs is a continuing and long-standing demographic fact from, at least, the end of World War II through today. Thus, upholding the collar counties as a class is rational. But other variations among the collar counties are more evanescent. For example, some grow more rapidly at one time; at other times, others do. Legislation which has no sunset provision, like this, cannot rationally rely on transient factors but must be grounded in more enduring characteristics, such as those cited in *Smith*. The fragility of the distinctions that are relied on by the majority and discussed in detail by Justice Freeman in his dissent alone should lead this Court to grant the Petition for Writ of Certiorari and affirm the decision of the trial court.

Justice Freeman properly chides the majority for failing to deal with both prongs of an equal protection challenge. The first prong is relation to purposes of the act. As Justice Freeman notes: "If relation to purpose were the only relevant inquiry, special legislation could always be sustained, regardless of how arbitrary the distinction between the classes." 161 Ill.2d at ___, 641 N.E.2d at 368. Here, for

instance, the "blessed counties" are given just what the legislature wanted to give them, motor fuel taxing authority, but there is no "substantial difference of situation or condition" *Id.* that justifies this grant to these three counties alone.

Justice Freeman, relying on prior decisions of the Illinois Supreme Court, as well as on BRADEN AND COHN, The Illinois Constitution: An Annotated and Comparative Analysis, 209 (1969) (a book prepared for the 1969-70 Illinois Constitutional Convention), focuses on the need for the legislature not to draw arbitrary lines in order to avoid equal protection violations. Even accepting the "facts" as asserted by the Defendants, Justice Freeman finds that the Defendants' "facts" demonstrate the arbitrariness of the legislative classification. 161 Ill.2d at ___, 641 N.E.2d at 370.

The Illinois Supreme Court inappositely states that population can be an appropriate criterion to classify. 161 Ill.2d at ___, 641 N.E.2d at 364. However, there is no suggestion that the classification here is based on population, and, indeed, many counties in Illinois fall between the populations of McHenry County and DuPage County, including the other two collar counties of Lake and Will. Further, the Illinois Supreme Court acknowledges that Petitioners' documentation shows that "the worst congestion problems exist in the northeastern part of the State [and that] the [three designated] Counties rank high in terms of urban congestion based on miles of congested roadway and the cost of relieving the congestion." 161 Ill.2d at ___, 641 N.E.2d at 366. But that showing by Plaintiffs does not demonstrate how the Defendants are so unique as to justify their becoming the "blessed counties." *See* below. Petitioners have never opposed classification as such, rather

they have said that this particular legislative classification is unconstitutional, lacking in rational basis in its application to only the three favored counties.

In sum, as Justice Freeman points out in his dissent, the majority answers only one of the two prongs of a special legislation challenge and utterly fails to address the second prong, making it virtually impossible for plaintiffs to ever succeed, making the equal protection clause nugatory, and making the case for granting Plaintiffs' Petition for Writ of Certiorari more compelling, so that this Court can correct the error of the Illinois Supreme Court.

B. 55 *ILCS* 5/5-1035.1 Is A Paradigm Case Of Impermissible Legislation

Legislation which creates dissimilarities in the taxing powers of local governments, if unsupported by a reasonable legislative classification of the governments which are granted disparate taxing powers, violates the equal protection clause. *Kremers v. City of West Chicago*, 406 Ill. 546, ___, 94 N.E.2d 337, 340 (1950). Similarly, legislation which confers special benefits on a group of local governments, where the basis for the grouping is random or arbitrary, violates the constitutional prohibition on local legislation (*i.e.*, violates equal protection). *Christen v. County of Winnebago*, 34 Ill.2d 617, ___, 218 N.E.2d 103, 106 (1966), *Pettibone v. West Chicago Park Commissioners*, 215 Ill. 304, ___, 74 N.E. 387, 399 (1905). Moreover, legislation which grants specific benefits to a group to local governments but denies the same benefits to governments which may in the future attain the same status as the benefitted governments violates the constitutional prohibition on local legislation. *People ex rel. East Side Levee & Sanitary Dist. v. Madison County Levee & Sanitary Dist.*, 54 Ill.2d 442, ___, 298

N.E.2d 177 (1973); *Pettibone v. West Chicago Park Comm'rs*, 215 Ill. at ___, 74 N.E. at 399.

In *Pettibone v. West Chicago Park Comm'rs*, the Illinois Supreme Court invalidated a statute which authorized park commissioners in park districts coextensive with a town within a city to issue bonds for the purpose of creation of new parks. 215 Ill. at ___, 74 N.E. at 399. The statute designated a single park district — the Park District of West Chicago — for special benefits and it limited the benefit to those districts having the specified characteristics when the law was enacted. The statute violated the constitutional prohibition of local legislation because the classification scheme, which designated a single park district, was arbitrary and because the statute had no rational ground. *Id.*

Similarly, in *People ex rel. East Side Levee & Sanitary Dist. v. Madison Cty. Levee and Sanitary Dist.*, the Illinois Supreme Court invalidated a statute which granted the benefit of single-county administration and control to sanitary districts serving two counties and having an equalized assessed valuation of $100 million as of the effective date of the Act. The law applied only to Madison and St. Clair Counties. Finding no reason for restricting the putative benefits to two counties, the court held that the statute was impermissible local legislation. 54 Ill.2d at ___, 298 N.E.2d at 180. In *Kremers, supra*, the Illinois Supreme Court invalidated a law that had the effect of producing different tax rates in local governments of the same size and type, exactly the situation here. 406 Ill. at ___, 94 N.E.2d at 340. In *Christen v. County of Winnebago*, the Illinois Supreme Court invalidated a statute that allowed counties having a population of more than

200,000 but less than one million to issue general obligation bonds without referendum for purposes of construction of county court houses. 34 Ill.2d at ___, 218 N.E.2d at 106. The court noted that the legislature had found a statewide need for new county court houses and, accordingly, characterized the statutory classification scheme as "random." 314 Ill.2d at ___, 218 N.E.2d at 105, 106.

Under 55 *ILCS* 5/5-1035.1, a county will qualify for a new taxing power if it is named DuPage, Lake or McHenry. A more arbitrary and random scheme for classification cannot be imagined:

> An obvious example of local legislation would be a statute proposing to permit the city of Onetown to have five dog-catchers, notwithstanding a general law that limited all cities to four dog-catchers. Another example would be a law which permitted Onetown to annex North Onetown, whether or not there was a general law setting forth a procedure for annexation.

BRADEN AND COHN, The Illinois Constitution at 207. The classification schemes invalidated in *Pettibone*, *Christen*, *Kremers*, or *East Side Levee* were, at least, legislative efforts to write a general law. Here, the legislature has simply disregarded the constitution by writing a purely local law without even attempting to establish a framework of general applicability. 55 *ILCS* 5/5-1035.1 is a paradigm case of impermissible unequal protection and should be invalidated.

C. Classification Of Counties By Name Alone Is Not A Rational Scheme

55 *ILCS* 5/5-1035.1 permits the counties of DuPage, Kane and McHenry by name to impose a tax on retail sales of motor fuel. No other county qualifies under that legislation for the privilege of imposing a motor fuel tax within its territory. The sale of motor fuel at retail from outlets in DuPage, Kane or McHenry counties is thus

subject to a particular burden not imposed on motor fuel in one of the neighboring "collar counties" of Lake or Will nor in any of the other ninety-six[2] counties of Illinois — large or small, urban or rural, developing or declining.

A legislative classification scheme will satisfy the constitution if it is based upon "a rational difference in situation or condition." *In re Belmont Fire Protection District*, 111 Ill.2d 373, ___, 489 N.E.2d 1385, 1388 (1986). 55 *ILCS* 5/5-1035.1 provides no classification scheme, other than that of identifying by name the counties that will benefit from the advantage of additional revenue. Either the statute is constitutionally defective on its face or a rational classification scheme must be implied from the situation or condition of the three named counties.

The Counties might have argued that the statute satisfies the requirement of a reasonable classification scheme because it applies only to large counties. Population-based classification schemes often satisfy the test of reasonable classification. *Belmont*, 111 Ill.2d at ___, 489 N.E.2d at 1388. However, no population-based scheme is expressly provided in the statute, nor can one be inferred. The Counties of Lake, Will, Winnebago, Peoria, Sangamon, Champaign,

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[2] Cook County is the 102nd county and has home rule powers to tax the retail sale of motor fuel.

and Rock Island all have populations that fall within the parameters impliedly employed in the statute.[3]

Arguably, DuPage, Kane and McHenry counties are alike in that all are proximate to Cook County and subject to problems related to urbanization to a degree not found elsewhere in Illinois. See, *e.g.*, *People ex rel. County of DuPage v. Smith*, 21 Ill.2d 572, 173 N.E.2d 485 (1961). Yet, Lake and Will counties are also proximate to Cook County and subject to the same problems of urbanization but are inexplicably excluded.

Arguably, DuPage, Kane and McHenry counties are alike in that all are experiencing rapid population growth. Yet, given the historical growth rate of Lake and Will Counties, the exclusion of those counties from the fuel tax classification scheme is nonsensical. See, *e.g.*, *Christen v. County of Winnebago*, 34 Ill.2d at ___, 218 N.E.2d at 105.

The standard for judicial review of challenged legislation is as follows:

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[3] According to the 1980 census (the last census prior to the enactment of P.A. 86-16), the population of the counties named in P.A. 86-16 was:

County	Population
DuPage	658,835
Kane	278,405
McHenry	147,897.

The 1980 census found the following populations in other Illinois counties:

Lake	440,372
Will	324,460
Winnebago	250,884
Peoria	200,466
Sangamon	176,089
Champaign	168,392
Rock Island	165,968.

> To render a statutory classification valid, the classification must be based upon a rational difference of situation or condition found to exist in the persons or objects upon which the classification rests. [Citations omitted.] . . . [I]n addition to a reasonable basis for the classification, the classification must also bear a rational and proper relation to the evil to be remedied and the purpose to be attained by the legislation. [Citations omitted.]

In re Belmont Fire Protection District, 111 Ill. 2d 373, 380, 489 N.E.2d 1385, 1388 (1986). *See* also, *County of Bureau v. Thompson*, 139 Ill.2d 323, 336, 564 N.E.2d 1170, 1177 (1990).

The presumption of constitutionality accorded to any legislative enactment, including laws which classify counties or laws which confer the privilege of imposing a tax, is overcome when a law "arbitrarily discriminates in favor of a select group." *County of Bureau*, 139 Ill.2d at 336, 564 N.E.2d at 1177-78; *Belmont*, 111 Ill.2d at 380, 489 N.E.2d at 1388.

D. There Are Rational Bases for Classification

The facts reported in a 1989 survey of road conditions in Illinois indicate that the problems facing DuPage, Kane and McHenry counties are not different from those of other counties similarly situated.[4] Illinois Department of Transportation, *Lifelines to the Economy* (1989).

The *Lifelines* study assesses the current conditions and future needs of the state's transportation systems, including state roadways. The study found that serious problems of roadway congestion exist in

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[4] In 1991, the legislature added an element of non-uniformity even among the three favored counties. P.A. 87-289, effective January 1, 1992, authorizes Kane County, but only Kane County, to "exempt diesel fuel from the tax imposed pursuant to this section." So not only is the act invalid for the reasons set forth in the main text, it is also non-uniform among the favored three counties, as the legislature piles another element of invalidity into the mix.

densely populated areas of the state. The study identified the number of miles of congested roadways in each county and forecast the cost of relieving the congested conditions. *Lifelines* at p. 32, *id.* The "worst" counties — as measured by miles of over-utilized roadways — were: DuPage County (152.2 miles; $984.1 million needed to alleviate congestion); Lake County (38.1 miles; $168.1 million); Madison County (23.8 miles; $90.6 million); Will County (17.8 miles; $92.7 million); and McHenry County (15.4 miles; $84.1 million).[5] *Id.*

The *Lifelines* study was published in April, 1989 and was available to legislators when the statute was under consideration. The *Lifelines* data indicate significant differences in congestion conditions in DuPage and McHenry counties. The data also indicates that a classification of counties based on roadway congestion would include Lake and Will Counties in addition to DuPage, Kane and McHenry in Northeastern Illinois and St. Clair and Madison Counties in downstate Illinois. It is untenable to argue, as the Counties have, that the legislature properly focused on "rapid population growth or increased usage of roads" in three counties alone. The contemporaneously available — and contradictory — facts deprive the Counties' argument of credibility.

A much more credible explanation of the classification scheme is found in the legislative debates. There, legislators from Lake County — a county which should have been included in a rational classification scheme based on similarity of conditions — spoke in support of the Act

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[5] If ranked by cost to create new roadway capacity, the list would also include St. Clair County (10.5 miles; $216.4 million). Contrast: Peoria County (6.4 miles; $19 million); Rock Island County (9.1 miles; $52 million).

because it excluded Lake County from the scope of the County Motor Fuel Tax.

Representative John Matijevich, a Democrat from North Chicago in Lake County had this to say on June 30, 1989:

> I was sort of apprehensive at first about voting for this because my County Board wanted me also to vote for a local option, a four cent option. And I said to my County Board, you know that we're on the border of Wisconsin . . . . I didn't want four cents on top of that for my County of Lake . . . . I just didn't want my county to have one on top of that.

House Transcript, June 30, 1989, p. 257.

Senator Adeline Geo-Karis, a Republican from Zion, also in Lake County, said on the same day:

> I did object to the fact that it was included for my county to be able to go up to four cents. That has been taken out. (Emphasis added.)

Senate Transcript, June 30, 1989, p. 309.

Thus, the opposition by two legislators from Lake County, one a Republican and one a Democrat, one a Senator and one a Representative, but both in the leadership of their respective parties in their respective Houses, led to a perfectly understandable political accommodation. There is absolutely nothing wrong with political accommodations; indeed, they are necessary for government to run. However, political accommodations must still meet constitutional standards. The equal protection clause prevents states from arbitrarily granting privileges to politically powerful local governments or penalizing the politically weak or disfavored.

As the Illinois Supreme Court said in *In re Belmont Fire Protection District*:

> The record demonstrates that there is no substantial difference between the situation existing in DuPage County and the conditions which exist in Kane, McHenry, DeKalb, Lake, Will, Sangamon, Winnebago, and Champaign counties insofar as municipalities that are served by multiple fire protection districts is concerned. We can perceive of no rational reason why a municipality served by multiple fire protection districts in a county with a population between 600,000 and 1 million can be said to differ from a municipality which is served by multiple fire protection districts in a county with less than 600,000 or more than 1 million inhabitants. If a real need exists to eliminate the alleged disadvantages and dangers of multiple fire protection districts serving one municipality, then the same need to remedy this evil also exists in other counties as well, regardless of the level of the population of the county.

111 Ill.2d at 381-82, 489 N.E.2d at 1389.

The Illinois Supreme Court's reasoning in *Belmont* should apply with equal force to the facts of the present case. There is simply no substantial difference between the conditions which exist in DuPage, Kane and McHenry counties and the conditions in counties of comparable size or proximity to a large metropolitan area.[6] If a real need for roadway improvements exists in DuPage, Kane and McHenry counties, then the same need to remedy the problem exists in other Illinois counties as well. Indeed, another provision of P.A. 86-16, an increase in the rate of the state motor fuel tax, seems to have been enacted to accomplish just that purpose.

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[6] For this reason, *People ex rel. County of DuPage v. Smith*, 21 Ill.2d 572, 173 N.E.2d 485 (1961), on which the Counties rely, is readily distinguishable. The statute upheld in *Smith* applied to all the "collar" counties bordering on Cook County. 55 *ILCS* 5/5-1032.1 applies to only three of the collar counties — and not even the three largest of the five counties which surround Cook County. Here, the very fact that the legislature identified the three counties by name indicates that it could devise no general description to define a class that would include DuPage, Kane and McHenry counties but exclude Lake and Will counties.

E. The Trial Court's Decision

The trial court, after reviewing the arguments and the evidence adduced by Plaintiffs and using the standards enunciated by this Court, correctly decided:

> Plaintiffs have presented this Court with overwhelming evidence that the problem of deteriorating roadways and the need for additional transportation infrastructure is not limited to the Counties of DuPage, Kane and McHenry. Furthermore, plaintiffs have negated every conceivable basis for the classification drawn by this legislation. There is no possible set of circumstances under which these three counties could be classified together without excluding some other county similarly situated. Classifications based on size, population, population growth, projected population growth, miles of highways, number of bridges in need of repair and daily average of highway miles driven, all would include counties in addition to the three named in P.A. 86-16. In addition, these three counties are not the poorest counties in the state, and there is no indication that these counties have an insufficient tax base from which they could finance the construction and repair of roads, bridges and waterways.
>
> Since P.A. 86-16 confers a benefit upon a portion of the state to the exclusion of others similarly situated, it . . . is void.

Op. 11/10/92, pp. 23-24.

F. The Counties' Argument Rests Entirely On Conjecture

1. In General

The Counties, however, contended that DuPage, Kane and McHenry represent a unique class in that, so they say, those three counties experienced the fastest population growth in the state between 1980 and 1987. This alleged uniqueness of the three counties provides a rational basis for the granting of special powers, they argue. Accordingly, on the Counties' view, 55 *ILCS* 55-1035.1 should be sustained.

The Counties' argument is grounded on the Affidavit of DuPage County Engineer Karl D. Fry and its attachments. Absent that testimony, the Counties' argument is without any substantiation. The trial court correctly struck the Fry Affidavit and its supporting "documentation." However, even if the assertions made in the Fry Affidavit are allowed to stand, the Counties' argument still falls far short of demonstrating a rational basis for the challenged classification scheme.

The Counties modestly suggested that "the affiant could have disclosed more facts upon which his opinion was based." In fact, Mr. Fry was competent to testify on almost none of the matters covered by the affidavit.

2. The Population Argument

The Counties argument depends upon a semantic and statistical sleight of hand. Their position is that at the time of the passage of Public Act 86-16, DuPage, Kane and McHenry counties were the fastest growing counties in the State of Illinois.

This statement is true, according to the table attached to the Fry Affidavit, only in one sense: The three counties had the highest percentage change in population of the seventeen counties included in the survey. However, if the counties (other than Cook County) were arrayed by absolute change in population, the ordering would be: DuPage (net growth: 101,942); Lake (net growth: 54,912); Kane (38,395); McHenry (23,203); and Will (22,240). Under the latter analysis of "growth rate," Lake County certainly should be included in a classification of "fastest growing Illinois counties" and, given the range of error present in all census data, extrapolations from census

data, and estimated population counts, Will County should also be included.[7]

Even supposing that the Counties have selected the appropriate measure of "growth," and further supposing that the Counties have presented competent evidence of that growth, however, the argument from statistics is still unavailing, as nothing in the Counties' argument shows that its data were available to the General Assembly when P.A. 86-16 was enacted or that the data had even been prepared by that time. Plaintiffs have previously assumed that the most recent census data that would have been available to the legislature in 1989 was the results of the 1980 federal census. The Counties produced population "estimates" (without disclosing the identity or credentials of the estimator) for the years 1985, 1986, 1987 and 1988.

Cases involving disputes over the accuracy of the decennial census teach that there is a lag time between the taking of a census and the publication of the results.[8] Here, because of the anonymous nature of the population table attached to the Fry Affidavit, there is simply no

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[7] All population measurements, including the decennial federal census, are inaccurate to some degree. *Tucker v. U.S. Dept. of Commerce*, 958 F.2d 1411, 1413 (7th Cir. 1992). The population estimates appended to the Fry Affidavit and apparently relied upon by Intervening Defendant show that McHenry County gained 23,203 inhabitants between 1980 and 1987 while Will County gained 22,240. The difference in growth is only 963, .56% of the total population of McHenry County and .28% of the total population of Will County. Thus the "difference" which purportedly distinguishes McHenry County from Will County is well within the range of error that typifies population measurements and, therefore, without statistical significance sufficient to justify a distinction between McHenry and Will Counties based on population growth.

Further, neither the Counties nor their affiant have produced credentials that establish their expertise in the field of statistics; their assertions and inferences are flawed both for lack of competence and lack of intellectual and statistical rigor.

[8] *See, e.g., Ambach v. Bell*, 686 F.2d 974, 977-78 (D.C. 1982).

way of knowing when the "populations" reported were measured or when the results of those measurements were published. Consequently, no inference can be drawn that there was any current population data available to the legislature in 1989, much less estimates of 1985, 1986, 1987 or 1988 populations. Nor have the Counties produced any other contemporaneous evidence that "at the time of the passage of Public Act 86-16" the legislature focused on the "fact" that "DuPage, Kane, and McHenry counties [but not Lake County] were the fastest growing counties in the State." A less strained theory is that the legislature simply shared in the "common knowledge" that Northeast Illinois is the fastest growing [area] in the state.[9]

In short, even if the results of semantic and statistical hair-splitting can be said to constitute a rational basis for the classification scheme of the statute, there is simply no evidence to show that the legislature either had the data or used it. Moreover, if the legislature did intend to draw classifications based on the criteria suggested by the Counties, it could have written the statute to grant taxing powers to counties having the largest percentage population growth, define the relevant measures and provide for repeal of the power if the population growth were to cease, or provide an automatic repealer at some defined time in the future when the legislature could re-evaluate the assumed

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[9] In contrast, the *Lifelines to the Economy* study was available to the legislature in the Spring of 1989. That contemporaneously available publication is notably lacking in discussion of population data but abundantly documents the problem of urban roadway congestion.

criterion.[10] Instead, the legislature provided a taxing power in perpetuity whether or not the three named counties remain (allegedly) the three fastest growing counties in the state.

Last, the Counties have not shown any direct correlation between population increase and a need for additional taxing power for road purposes sufficient to justify the legislation.

3. The Insufficiency Of The Fry Affidavit

Illinois Supreme Court Rule 191(a) states criteria which ensure the competency and trustworthiness of statements contained in affidavits given in support of a motion for summary judgment. *Solon v. Godbole*, 163 Ill.App.3d 845, ___, 516 N.E.2d 1045, 1049 (3rd Dist. 1987). Supreme Court Rule 191(a) states:

> . . . . Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure . . . shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. If all of the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used.

ILCS, S.Ct. Rule 191(a).

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[10] For this reason, the Counties' reliance upon *People ex rel. County of DuPage v. Smith*, 21 Ill.2d 572, 173 N.E.2d 485 (1961) is misplaced. Nothing in *Smith* approves of the kind of micro-analysis of demographic trends that Intervening Defendant recommends. On the contrary, the *Smith* court simply noted that the classification criteria appeared on the face of the challenged statute (namely, contiguity to a county having a population greater than one million) and held that " 'proximity to great centres of population' may present a reasonable basis for classification, particularly where matters of health are concerned." 173 N.E.2d at 489. *Smith* is not authority for the proposition that just three of the five collar counties constitute a cognizable class, as the Counties suggest.

The Fry Affidavit satisfied none of the requirements of Supreme Court Rule 191(a). Fry, the affiant, states that he is the county engineer for DuPage County. The statutory duties of a county engineer do not include the conducting of demographic analyses. Thus, Fry is not qualified as an expert in matters of demographics, absent a further demonstration of such qualifications. Fry makes no claim to training, practical expertise or even general knowledge in this field. Yet, Fry "testifies" to the population trends in DuPage County as well as Lake, Kane and McHenry Counties.

Fry states that he is the county engineer for DuPage County and that, in that capacity, "he is familiar with the highway systems of DuPage and surrounding counties." Fry then states that between 1980 and 1987 DuPage, Kane and McHenry Counties experienced the highest percentage of population growth in the State exclusive of Cook County. He also states that DuPage, Lake, Kane and McHenry Counties experienced the highest numerical growth in population between 1980 and 1987.

Attached to the Affidavit are a bar graph entitled "Population Change in Illinois Counties over 100,000: 1980 to 1987" and an untitled and unpaginated table. The Affidavit makes absolutely no reference to these attachments. However, as the Affidavit provides no other basis for Fry's assertions about relative county population growth rates (the possession of such knowledge not being among the statutory duties of a county engineer nor being within the scope of affiant's knowledge of "the highway systems of DuPage County and surrounding counties"), the attachments are, presumably, the basis of the statements made.

The column headings of the table state that the populations listed are "estimated." Neither the Affidavit nor the attachments disclose the identity or qualifications of the estimator nor the date when the estimates were made. Fry does not claim authorship. The data presented are not identified as federal census data. The data are therefore of unknown provenance and were properly stricken.[11]

The trial court, after reviewing the additional arguments of the Counties, stated:

> Supreme Court Rule 191 requires that affidavits "shall be made on the personal knowledge of the affiants, shall set forth with particularity the facts upon which the . . . defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto".
>
> Nothing has been submitted to this Court to alter its previous opinion that the Affidavit of Karl Fry should be stricken. The meticulous analysis of the plaintiffs underscoring the deficiencies of the affidavit are in accord with the Court's opinion. The affidavit violates the mandate of Supreme Court Rule 191.
>
> The graph and table are not incorporated by reference in the affidavit. No sworn or certified copies are attached. They are simply included without explanation. Hence, any portions of an affidavit which refer to or rely upon such documentation are to be stricken. As the plaintiffs correctly state, "the data are therefore of unknown provenance and should be stricken".
>
> The affidavit submitted failed to meet the requirement for such documents as set forth in Supreme Court Rule 191. When the

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[11] The data set is also incomplete. The graph and table survey the populations of seventeen counties. Neither the affidavit nor the attachments explain why only seventeen of the 102 counties of Illinois were sampled.

affidavit and accompanying documents are stricken, there is no factual evidence to sustain DuPage County's motion for summary judgment.

Op. 4/2/92, pp. 11-12.

II.

THE ILLINOIS SUPREME COURT VIOLATED PETITIONERS' DUE PROCESS RIGHTS BY RELYING ON A MERE CONJECTURE

The Illinois Supreme Court took as true matters that had been properly excluded from the record, namely the population changes in the counties of Illinois from 1980-87. The Illinois Supreme Court never overturned the decision of the trial court in twice excluding that data. Petitioners, therefore, lost this case for failing to disprove a mere conjecture. *See* the discussion in I above. Thus, if bald-faced lies or just plain untruths are presented, without any foundation or basis, to a court in defense of an equal protection challenge, the plaintiff will be put to the test of negating all such proposals that can be conceived by the ever-imaginative mind of man. If that be the rule, then due process of law becomes a sham. This Court should require more of defendants, as it does in all other areas of law. *See, e.g.*, the views expressed by Justice Stevens in dissent as well as concurrence in *United States R.R. Retirement Board v. Fritz*, 449 U.S. 166, 101 S.Ct. 453, 61 L.Ed. 368 (1980); *Nordlinger v. Hahn*, 505 U.S. ___, 112 S.Ct. ___, 120 L.Ed.2d 1 (1992); and *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 935 S.Ct. 1001, 35 L.Ed.2d 351 (1973).

CONCLUSION

Wherefore, the Petitioners ask this honorable Court to grant their Petition for Writ of Certiorari and, upon full briefing and oral argument, reverse the decision of the Illinois Supreme Court.

Dated: January 3, 1995.

Respectfully submitted,

Myron M. Cherry*
Cherry & Flynn
30 North LaSalle Street
Suite 2300
Chicago, Illinois 60602
(312) 372-2100

Robert L. Sklodowski
Sklodowski, Franklin, Puchalski
& Reimer
111 West Washington Street
Suite 1000
Chicago, Illinois 60602
(312) 201-8202

Lee J. Schwartz
30 North LaSalle Street
Suite 2300
Chicago, Illinois 60602
(312) 553-5050

Attorneys for Petitioners
* Counsel of Record

Appendix 1-1

641 N.E.2d 360
161 Ill.2d 409

Connie CUTINELLO et al., Appellees,

v.

**Douglas L. WHITLEY, Director of Revenue, et al.
(County of Kane et al., Appellants) (sic).**

No. 75468.

Supreme Court of Illinois.

May 19, 1994.

Dissenting Opinion of Justice
Freeman June 1, 1994.

Rehearing Denied Oct. 3, 1994.

David R. Akemann, State's Atty., and J. Patrick Jaeger, Asst. State's Atty., St. Charles, James Ryan, State's Atty., Mark Shannahan, Asst. State's Atty., and Edward A. Burmila, Special Asst. State's Atty., Wheaton, and Gary W. Pack, State's Atty., and Mary Kay Walter, Asst. State's Atty., Woodstock, for appellants.

Myron M. Cherry, Cherry & Flynn, P.C., Robert L. Sklodowski, Sklodowski, Franklin, Puchalski & Reimer, and Lee J. Schwartz, Chicago, for appellees.

Justice NICKELS delivered the opinion of the court:

Plaintiffs, as purchasers and retailers of motor fuel in Du Page, Kane, and McHenry Counties (Counties), brought a class action suit in the circuit court of Cook County challenging the constitutionality of the County Motor Fuel Tax Law (Ill.Rev.Stat.1991, ch. 34, par. 5-

1035.1). This statute allows the counties of Du Page, Kane, and McHenry to impose a tax on individuals who sell motor fuel at retail in the respective counties. The trial court found the statute unconstitutional and ordered that taxes collected by the Illinois Department of Revenue be placed in a special fund to be disbursed to plaintiffs. The Counties appealed directly to this court. (134 Ill.2d R. 302(a).) We reverse.

I. Background

In 1989, the General Assembly passed Public Act 86-16. The Act addresses statewide transportation needs and provides assistance to the different areas of the State. The County Motor Fuel Tax Law is part of this act. It provides, in pertinent part:

> "The County board of the counties of Du Page, Kane and McHenry may, by an ordinance or resolution adopted by an affirmative vote of a majority of the members elected or appointed to the county board, impose a tax upon all persons engaged in the county in the business of selling motor fuel, as now or hereafter defined in the Motor Fuel Tax Law, at retail for the operation of motor vehicles upon public highways or for the operation of recreational watercraft upon waterways. * * * The tax may be imposed in half-cent increments, at a rate not exceeding 4 cents per gallon of motor fuel sold at retail within the county for the purpose of use and consumption and not for the purpose of resale. The proceeds from the tax shall be used by the county solely for the purpose of operating, constructing and improving public highways and waterways, and acquiring real property and right-of-ways for public highways and waterways within the county imposing the tax.
>
> A tax imposed * * * shall be administered, collected and enforced by the Illinois Department of Revenue * * *." (Ill.Rev.Stat.1991, ch. 34, par. 5-1035.1.)

Pursuant to the authority granted by the statute, the county boards of Du Page, Kane and McHenry Counties approved ordinances imposing

a fuel tax per gallon on motor fuel sold at retail. Under the statutory scheme, the Department of Revenue collects the tax and then distributes it to the Counties.

On March 8, 1992, plaintiffs initiated this class action proceeding. Their complaint, as amended, seeks injunctive relief against defendants, the Director of Revenue, the Comptroller of the State of Illinois, the Treasurer of the State of Illinois, Du Page County, as an intervening defendant, and the counties of Kane and McHenry. In count I, plaintiffs allege that the statute violates the special legislation and reasonable classification provisions of the Illinois Constitution (Ill. Const.1970, art. IV, § 13; Ill. Const.1970, art. IX, § 2). Plaintiffs also allege in count I that the statute violates the equal protection provisions of the State and Federal Constitutions (Ill. Const. 1970, art. I, § 2; U.S. Const., amend. XIV). In counts II and III, plaintiffs allege that the General Assembly violated the single-subject and three-readings requirements of the Illinois Constitution (Ill. Const.1970, art. IV, § 8(d)) when it enacted the statute. Plaintiffs requested a permanent injunction from the circuit court to enjoin future collection of the taxes. Plaintiffs further requested a preliminary injunction requiring that any taxes collected by the Department of Revenue be placed in a special fund.

On November 10, 1992, the trial court issued a "Memorandum of Decision." In the memorandum, the trial court found that the statute violates the special legislation provision. Because the trial court found the statute unconstitutional, it stated that the county ordinances passed pursuant to the statute were invalid. The trial court did not address the other unconstitutional challenges raised by plaintiffs. On November

20, based on the memorandum of decision, the trial court granted plaintiffs' request for a preliminary injunction. The trial court ordered that all proceeds collected by the Department of Revenue pursuant to the statute be placed in a special fund. The trial court also certified the action as a class action with the class to be composed of purchasers and sellers of motor fuel.

On January 22, 1993, plaintiffs filed a motion for a temporary restraining order to prevent the Counties from spending fuel tax proceeds disbursed to them by the Department of Revenue before the preliminary injunction issued. In addition, plaintiffs requested that the Counties be required to turn over all tax proceeds to the special fund. The Counties asserted that turnover was improper because plaintiffs' complaint sought only prospective relief. According to the Counties, plaintiffs sought turnover from the Department of Revenue for current taxes, not for back taxes from the Counties. Initially, the trial court ordered McHenry County to turn over all tax proceeds to the court-appointed trustee and restrained Kane and Du Page Counties from spending any unobligated funds. Before the trial court entered a final ruling on the matter, however, plaintiffs and Du Page County each filed motions for summary judgment.

The trial court entered summary judgment for plaintiffs on April 6, 1993. The trial court again found the statute unconstitutional and permanently enjoined defendants from collecting county motor fuel taxes. The injunction has been stayed pending appeal. The trial court denied plaintiffs' motion for turnover of funds previously collected by Du Page and Kane Counties and ordered that funds turned over by McHenry be returned to McHenry County.

On direct appeal, the Counties raise two issues:

(1) whether the trial court erred in finding the County Motor Fuel Tax Law unconstitutional; and

(2) whether the trial court erred in certifying consumers as members of the plaintiff class.

Plaintiffs have cross-appealed. Plaintiffs ask that the Counties turn over the proceeds disbursed to the Counties before the preliminary injunction issued. We find the County Motor Fuel Tax Law constitutional. Therefore, we do not address the remaining issues.

II. Special Legislation

Plaintiffs first challenge the statute as violative of the special legislation provision of the Illinois Constitution. We note that plaintiffs also challenge the statute on the basis of equal protection and reasonable classification in count I of their complaint. In their brief to this court, plaintiffs acknowledge that the approach used to evaluate a special legislation challenge is similar to the approach to evaluate the other challenges alleged in count I. (*See DeLuna v. St. Elizabeth's Hospital* (1992), 147 Ill.2d 57, 74-75, 167 Ill.Dec. 1009, 588 N.E.2d 1139.) Plaintiffs therefore address only the special legislation challenge, and we do likewise.

The special legislation proscription of the Illinois Constitution provides that "[t]he General Assembly shall pass no special or local law when a general law is or can be made applicable." (Ill. Const. 1970, art. IV, § 13.) Special legislation confers a special benefit or exclusive privilege on a person or a group of persons to the exclusion of others similarly situated. (*Bridgewater v. Hotz* (1972), 51 Ill.2d 103, 109-10, 281 N.E.2d 317.) The special legislation provision does not, however,

prohibit classification. Its purpose is to prevent arbitrary legislative classifications. *In re Belmont Fire Protection District* (1986), 111 Ill.2d 373, 379, 95 Ill.Dec. 521, 489 N.E.2d 1385.

It is well settled that review of a special legislation challenge is governed by the same standard that applies to review of equal protection challenges. (*Nevitt v. Langfelder* (1993), 157 Ill.2d 116, 125, 191 Ill.Dec. 36, 623 N.E.2d 281; *DeLuna*, 147 Ill.2d at 75, 167 Ill.Dec. 1009, 588 N.E.2d 1139; *Bilyk v. Chicago Transit Authority* (1988), 125 Ill.2d 230, 236, 125 Ill.Dec. 822, 531 N.E.2d 1; *In re Belmont Fire Protection District*, 111 Ill.2d at 379, 95 Ill.Dec. 521, 489 N.E.2d 1385.) The statute at issue does not affect a fundamental right or involve a suspect or quasi-suspect classification. Thus, the appropriate standard for review is the rational basis test. (*Nevitt*, 157 Ill.2d at 125, 191 Ill.Dec. 36, 623 N.E.2d 281.) Under this standard, a court must determine whether the classification at issue is rationally related to a legitimate State interest. (*Bilyk*, 125 Ill.2d at 236, 125 Ill.Dec. 822, 531 N.E.2d 1.) To be constitutional under this inquiry, there must be some rational basis for the classification. (*In re Belmont Fire Protection District*, 111 Ill.2d at 380, 95 Ill.Dec. 521, 489 N.E.2d 1385.) Whether a rational basis exists for a classification presents a question of law, which we review *de novo*.

When evaluating a classification, a reviewing court considers the broad discretion of the legislature to create statutory classifications for the general welfare. (*Bilyk*, 125 Ill.2d at 236, 125 Ill.Dec. 822, 531 N.E.2d 1.) Thus, classifications made by the legislature are presumed valid, and any reasonable doubts must be resolved in favor of upholding them. (*Bilyk*, 125 Ill.2d at 235, 125 Ill.Dec. 822, 531 N.E.2d 1.)

Further, a statute will be upheld "if any set of facts can be reasonably conceived which justify distinguishing the class to which the law applies from the class to which the statute is inapplicable. (*Bilyk*, 125 Ill.2d at 236, 125 Ill.Dec. 822, 531 N.E.2d 1.) Our review in this regard is therefore deferential, and plaintiffs have the burden of establishing the unreasonableness of the legislative action. *DeLuna*, 147 Ill.2d at 67, 167 Ill.Dec. 1009, 588 N.E.2d 1139.

The Counties argue that the General Assembly has made a classification based on the rapid population growth of Du Page, McHenry, and Kane Counties in northeastern Illinois. The Counties contend that, at the time the legislation was passed, these three counties were the fastest growing counties in the State. According to the Counties, this growth has created a need for building, maintenance, and repair of the Counties' highway systems to a greater degree than exists in counties in other parts of the State. The County Motor Fuel Tax Law, the Counties maintain, is a reasonable means by which to fund necessary transportation projects.

This court has long recognized that a legislative classification may be based on population. (*See, e.g., Nevitt*, 157 Ill.2d 116, 191 Ill.Dec. 36, 623 N.E.2d 281 (statute involving disability payments did not apply to home rule units with populations over one million); *People ex rel. Scott v. Chicago Thoroughbred Enterprises, Inc.* (1973), 56 Ill.2d 210, 306 N.E.2d 7 (statute involving tax rates only applied to race tracks located with 100 miles of cities with one million population or in counties of 500,000 population); *Bridgewater*, 51 Ill.2d 103, 281 N.E.2d 317 (statute involving election of county board members applied only to counties with a township form of government and a

population of three million or less).) In addition, population and territorial differences constitute reasonable bases for addressing transportation and traffic problems. *See, e.g., People ex rel. Curren v. Wood* (1945), 391 Ill. 237, 62 N.E.2d 809.

Initially, plaintiffs argue that the statute is invalid because the legislative action is specifically focused on Du Page, Kane, and McHenry Counties. Legislation, however, is not rendered special simply because it operates in only one part of the State. For example, in *Chicago National League Ball Club, Inc. v. Thompson* (1985), 108 Ill.2d 357, 91 Ill.Dec. 610, 483 N.E.2d 1245, this court upheld a classification which subjected Wrigley Field to noise emission regulations promulgated by the Illinois Pollution Control Board. The classification included all stadia in cities with populations in excess of one million that were used for nighttime sporting events. Wrigley Field, although not named in the statute, was the focus of the legislation. In upholding the statute, this court considered a number of factors, such as population density, road congestion, and adjoining land uses, which justified treating Wrigley Field differently from stadia in other parts of the State.

In *People ex rel. County of Du Page v. Smith* (1961), 21 Ill.2d 572, 173 N.E.2d 485, this court upheld a classification which included those counties contiguous to another county with a population over one million. The legislature authorized these counties to construct sewage facilities and to issue bonds to finance the facilities. Again, the court concluded that the "collar" counties around Cook County were the focus of the legislation. The statute was rational because of the "unique population and territorial combination giving rise to sewage

and population problems of unusual magnitude and urgency." (*Smith*, 21 Ill.2d at 579, 173 N.E.2d 485.) Thus, legislative action that focuses on a specific area of the State will be upheld if a rational basis exists for distinguishing that area from the rest of the State.

Plaintiffs, however, contend that the legislature did not state its rational basis or make legislative findings regarding population growth and the need for transportation funding in the Counties. The rational basis test does not require such an explanation. It requires only that there be a reasonable relationship between the challenged legislation and a conceivable, and perhaps unarticulated, governmental interest. *Nordlinger v. Hahn*, (1992), 505 U.S. ____, _____, 112 S.Ct. 2326, 2334, 120 L.Ed. 2d 1, 15-16 ("Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification"); *accord United States R.R. Retirement Board v. Fritz* (1980), 449 U.S. 166, 179, 101 S.Ct. 453, 461, 66 L.Ed.2d 368; *McDonald v. Board of Election Commissioners* (1969), 394 U.S. 802, 809, 89 S.Ct. 1404, 1408, 22 L.Ed.2d 739, 745-46.

Plaintiffs argue that, in any event, the statute should have included Lake and Will Counties. Lake and Will Counties, like the three counties named in the statute, are adjacent to Cook County in north-eastern Illinois and, according to plaintiffs, were similarly experiencing rapid population growth at the time the legislation was passed. Plaintiffs therefore argue that all five counties are similarly situated and that the difference in treatment by the legislature is irrational. Plaintiffs do not argue that Cook County should have been included in the

statute. Cook County is a home rule unit with its own authority to pass a motor fuel tax.

The Counties rely on unauthenticated statistics to suggest that the legislative action is rational. According to the Counties, between 1980 and 1987, Du Page, Kane, and McHenry Counties were the three fastest growing counties in the State in terms of *percentage* growth. Plaintiffs do not dispute the rapid population growth in the northeastern part of the State. Plaintiffs, however, argue that, in terms of percentage growth, Lake and Will were growing nearly as fast as the Counties. Lake, like the Counties, experienced double-digit percentage growth, although it did rank behind them. Plaintiffs argue that, in terms of *absolute* population growth, Lake County was ranked second although the Counties were the other top ranking counties. Thus, according to plaintiffs, Lake is similarly situated to the Counties, and any classification excluding Lake County is irrational.

The legislature is generally given great flexibility in addressing the different needs throughout the State. Classification is an inevitable consequence of this flexibility. Classification "requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some point is a matter for legislative, rather than judicial, consideration.'" (*Federal Communications Comm'n v. Beach Communications, Inc.* (1993, 508 U.S. ____, ____, 113 S.Ct. 2096, 2102, 124 L.Ed.2d 211, 223, quoting *Fritz*, 449 U.S. at 179, 101 S.Ct. at 461, 66 L.Ed.2d at 378-79.) Thus, it is presumed that the legislature "acted conscientiously and did their duty in making a survey of the conditions prevailing in the [counties] of the State

before enacting the classification legislation." *In re Belmont Fire Protection District*, 111 Ill.2d at 380, 95 Ill.Dec. 521, 489 N.E.2d 1385.

Under the rational basis test, mathematical precision in creating a classification is not required. (*Nevitt*, 157 Ill.2d at 130, 191 Ill.Dec. 36, 623 N.E.2d 281.) Review of statistics will always reveal another county that could have been included in a classification. For this reason, "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." (*Beach Communications, Inc.*, 508 U.S. at ___, 113 S.Ct. at 2102, 124 L.Ed.2d at 222.) Transportation problems may exist to a lesser degree in other parts of the State than in the Counties. However, "the legislature is not bound to pass one law meeting every exigency, but may consider degrees of evil." *Smith*, 21 Ill.2d at 579, 173 N.E.2d 485.

Ultimately, it is plaintiffs' burden to show that a classification is unreasonable, not the Counties' burden to show that the classification is reasonable. Plaintiffs have failed to rebut the Counties' population argument. Plaintiffs argue that the legislature could better address transportation needs by basing its classification on congestion factors, not population growth. Under the rational basis test, however, a reviewing court will determine only whether a rational basis exists for the legislative action, not the wisdom of the classification. (*Beach Communications, Inc.*, 508 U.S. at ___, 113 S.Ct. at 2101, 124 L.Ed.2d at 221.) In any event, plaintiffs' own statistics show that the worst congestion problems exist in the northeastern part of the State. They also show that the Counties rank high in terms of urban conges-

tion based on miles of congested roadway and the cost of relieving the congestion.

We therefore find that the legislative action in question satisfies the rational basis test. The legislature rationally concluded that a greater need for transportation financing existed in Du Page, Kane, and McHenry Counties than in other parts of the State. To hold otherwise would make it more difficult for the General Assembly to pass legislation addressing the transportation needs of specific geographic areas of the State. Transportation needs, by their nature, involve territorial differences. Requiring more than a rational basis for such legislative action is unwarranted.

III. Single-Subject Requirement

Plaintiffs next challenge the County Motor Fuel Tax Law on the basis of the single-subject requirement. Specifically, plaintiffs argue that Public Act 86-16, which includes the County Motor Fuel Tax Law, violates the single-subject requirement of the Illinois Constitution. The Constitution provides that "[b]ills, except bills for appropriations and for the codification, revision or rearrangement of laws, shall be confined to one subject." (Ill. Const.1970, art. IV, § 8(d).) Plaintiffs argue that Public Act 86-16 encompasses a number of provisions that do not relate to any one subject. These provisions involve the county motor fuel tax, the State motor fuel tax, regulation of the Illinois Department of Transportation, funding for the Regional Transportation Authority, and the development of public transportation.

The number of provisions in an act is not determinative of its constitutionality. This court has often stated the approach for determining a violation of the single-subject rule:

> " 'The requirement of singleness of subject has been frequently construed, and the applicable principles are settled. The term "subject" is comprehensive in its scope and may be as broad as the legislature chooses, so long as the matters included have a natural or logical connection. An Act may include all matters germane to a general subject, including the means reasonably necessary or appropriate to the accomplishment of legislative purpose. Nor is the constitutional provision a limitation on the comprehensiveness of the subject; rather, it prohibits the inclusion of "discordant provisions that by no fair intendment can be considered as having any legitimate relation to each other." ' " (*People ex rel. Ogilvie v. Lewis* (1971), 49 Ill.2d 476, 487, 274 N.E.2d 87, quoting *People ex rel. Gutknecht v. City of Chicago* (1953), 414 Ill. 600, 607-08, 111 N.E.2d 626.)

The single-subject requirement is therefore construed liberally and is not intended to handicap the legislature by requiring it to make unnecessarily restrictive laws. For this reason, courts have often upheld legislation involving comprehensive subjects. *See, e.g., Advanced Systems, Inc. v. Johnson* (1989), 126 Ill.2d 484, 129 Ill.Dec. 32, 535 N.E. 797 (real property taxation); *People ex rel. Carey v. Board of Education* (1973), 55 Ill.2d 533, 304 N.E.2d 273 (schools); see also *In re Marriage of Thompson* (1979), 79 Ill.App.3d 310, 34 Ill.Dec. 342, 398 N.E.2d 17 (domestic relations).

In this case, the various provisions of Public Act 86-16 have a natural and logical connection to transportation. Plaintiffs argue that Public Act 86-16 deals with financing as well as transportation and therefore embraces two subjects. In enacting a bill, the legislature may provide the means necessary to accomplish the legislative purpose. Transportation systems rely heavily on taxation, and other financing mechanisms, to maintain their operations. Thus, financing provisions are reasonably necessary to the accomplishment of the legislative purpose.

IV. Three-Readings Requirement

Lastly, plaintiffs argue that Public Act 86-16 violates the three-readings requirement of the Illinois Constitution. The Constitution provides that "[a] bill shall be read by title on three different days in each house." (Ill. Const.1970, art. IV, § 8(d).) Plaintiffs argue that the legislature did not follow this procedure and therefore we should invalidate the Act.

Illinois follows the enrolled bill doctrine. This doctrine provides that once the Speaker of the House of Representatives and the President of the Senate certify that the procedural requirements for passing a bill have been met, "a bill is *conclusively* presumed to have met all procedural requirements for passage." (Emphasis added.) (*Geja's Cafe v. Metropolitan Pier & Exposition Authority* (1992), 153 Ill.2d 239, 259, 180 Ill.Dec. 135, 606 N.E.2d 1212.) Thus, under the enrolled bill doctrine, a court will not invalidate legislation on the basis of the three-readings requirement if the legislation has been certified. In this case, plaintiffs acknowledge that Public Act 86-16 was certified.

Plaintiffs argue that we should take this opportunity to reconsider the use of the enrolled bill doctrine, relying on *Geja's Cafe*, 153 Ill.2d 239, 180 Ill.Dec. 135, 606 N.E.2d 1212. In *Geja' Cafes*, this court noted that the General Assembly had not exercised much discipline in following the three-readings requirement. Ultimately, however, this court declined to abandon the enrolled bill doctrine. The *Geja's Cafe* court noted that the 1970 Constitutional Convention specifically contemplated the use of the enrolled bill doctrine to prevent the invalidation of legislation on technical or procedural grounds. (See 6 Record of Proceedings, Sixth Illinois Constitutional Convention 1386-

87; *see also Benjamin v. Devon Bank* (1977), 68 Ill.2d 142, 145, 11 Ill.Dec. 270, 368 N.E.2d 878.) The Convention determined that the legislature would police itself with respect to procedure. In *Geja's Cafe*, this court also noted that judicial review of legislative procedure would raise a substantial separation of powers concern. We continue to find these reasons persuasive and accordingly decline to abandon the enrolled bill doctrine.

V. Conclusion

The statute at issue is part of a comprehensive transportation bill that encompasses the entire State. The section of the bill allowing the Counties to pass ordinances imposing a fuel tax is just one part of the entire transportation assistance package. The danger that one part of the State would be favored at the expense of other parts is not implicated here. Ultimately, plaintiffs complain about the action their counties have taken in passing ordinances imposing a fuel tax, as permitted by statute. In this instance, their unhappiness is better rectified through the democratic process at the county board level than through an attack on the constitutionality of the enabling legislation.

For the foregoing reasons, we find that the County Motor Fuel Tax Law is constitutional. We therefore reverse the judgment of the circuit court and remand the cause to that court for further proceedings.

Reversed and remanded.

FREEMAN, J., dissents.

Justice FREEMAN, dissenting:

The majority holds that the County Motor Fuel Tax Law is constitutionally valid. Because I believe that the act constitutes impermissible special legislation, I respectfully dissent.

Special legislation confers a special benefit or exclusive privilege on a person or group of persons to the exclusion of other [sic] similarly situated. (*Bridgewater v. Hotz* (1972), 51 Ill.2d 103, 109-10, 281 N.E.2d 317.) "It arbitrarily, and without a sound, reasonable basis, discriminates in favor of a select group." (Emphasis omitted.) (*Illinois Polygraph Society v. Pellicano* (1980), 83 Ill.2d 130, 137-38, 46 Ill.Dec. 574, 414 N.E.2d 458.) Prior to the 1970 constitution, deference was accorded the legislature to determine whether a general law could be made applicable. That deference has been largely eliminated by article IV, section 13, of our current constitution. Under article IV, section 13, whether a general law can be made applicable is a matter for judicial determination. See *Bridgewater*, 51 Ill.2d at 110, 281 N.E.2d 317; *People ex rel. East Side Levee & Sanitary District v. Madison County Levee & Sanitary District* (1973), 54 Ill.2d 442, 447, 298 N.E.2d 177.

When a law is attacked as special legislation, it is the duty of the courts to decide whether the classification is unreasonable because it preferentially and arbitrarily includes a class to the exclusion of all others. (*Illinois Polygraph Society*, 83 Ill.2d at 138, 46 Ill.Dec. 574, 414 N.E.2d 458.) The majority states that "review of a special legislation challenge is governed by the same standard that applies to review of equal protection challenges," and that in this case, the court must determine whether the classification at issue is rationally related to a legitimate State interest. 161 Ill.2d at ___, 204 Ill.Dec. at 139, 641 N.E.2d at 363.

Although not entirely clear from the majority opinion, determination of whether legislation violates the proscription against special

legislation actually requires application of a two-pronged test. (*In re Belmont Fire Protection District* (1986), 111 Ill.2d 373, 380, 95 Ill.Dec. 521, 489 N.E.2d 1385.) It is not enough that the classification bear a rational relation to the purpose to be attained by the legislation. (*In re Belmont*, 111 Ill.2d at 380, 95 Ill.Dec. 521, 489 N.E.2d 1385.) There must be a reasonable basis for the classification *and*, in addition, the classification must bear a reasonable and proper relation to the purposes of the act and the evil it seeks to remedy. (*In re Belmont*, 111 Ill.2d 373, 95 Ill.Dec. 521, 489 N.E.2d 1385; *Bridgewater*, 51 Ill.2d at 111, 281 N.E.2d 317; *Du Bois v. Gibbons* (1954), 2 Ill.2d 392, 399, 118 N.E.2d 295.) If relation to purpose were the only relevant inquiry, special legislation could always be sustained, regardless of how arbitrary the distinction between the classes.

"The legislature cannot create a class through the medium of an arbitrary statutory declaration in order that the class may be the recipient of special and exclusive legislative favors." (*In re Belmont*, 111 Ill.2d at 380, 95 Ill.Dec. 521, 489 N.E.2d 1385, citing *People v. Brown* (1950), 407 Ill. 565, 584, 95 N.E.2d 888.) For a statutory classification to be valid, the classification must be based upon a rational difference of situation or condition found to exist in the persons or objects upon which the classification rests. (*In re Belmont*, 111 Ill.2d at 380, 95 Ill.Dec. 521, 489 N.E.2d 1385.) It is my opinion that the classification here is an arbitrary distinction not founded upon any substantial difference of situation or condition and it is, therefore, violative of article IV, section 13, of our constitution.

The act provides no reason as to why only Du Page, Kane and McHenry Counties are covered under the act. The act merely names,

without any qualifying characteristics, the three counties included within its scope. In *argument* to this court, the Counties suggest that conferral of the right to tax is because Du Page, Kane and McHenry Counties are the fastest growing counties in the State.

Certainly as the majority points out, no reason for a classification need be stated. Where some rationale is offered, however, we are not required to ignore it. That being the case, I find a portion of the legislative debates provided in the record to be relevant. The legislators made no mention of rapid growth as the basis for their distinction. They did, however, comment on the desire for economic development in the State and that improved roadways would entice business within the State's borders. (See 86th Ill.Gen.Assem., Senate Proceedings, June 30, 1989, at 256, 257.) Notably, Senator Geo-Karis lent support to the act, stating, "because you want to bring business and industry in this county — in this State, and you're not going to get it if you don't have adequate roads at least maintained well." 86th Ill.Gen.Assem., Senate Proceedings, June 30, 1989, at 309 (statements of Senator Geo-Karis).

Without doubt, the second prong of the special legislation test is satisfied. The gas tax will do just what it purports, with Du Page, Kane and McHenry Counties being the primary beneficiaries of an improved roadway system and economic development. The problem with the act, however, is that the first prong of the test — the basis for the distinction between those blessed counties and those which have not been included under the act — remains unsatisfied. If, in fact, the purpose of the act is to enhance economic development in Illinois, there can be no fair reason to limit participation to only three counties.

As the majority correctly notes, the special legislation provision does not prohibit all classification. It purports merely to prohibit *arbitrary* legislative classifications. (161 Ill.2d at ___, 204 Ill.Dec. at 139, 641 N.E.2d at 363.) I would agree with the majority that mathematical precision in creating a classification is not required. (See 161 Ill.2d at ___, 204 Ill.Dec. at 1405, 641 N.E.2d at 364.) However, in order to defeat a challenge to the reasonableness of a classification, any distinction between classifications, for purposes of special legislation analysis, must be founded upon a rational or substantial difference of situation or condition. (See *In re Belmont*, 111 Ill.2d at 382, 95 Ill.Dec. at 21, 489 N.E.2d 1385.) As related to the purposes of this act, there is no substantial difference of situation which can support this classification.

I also agree with the majority that legislation is not special merely because it operates in only one part of the State. (See 161 Ill.2d at ___, 204 Ill.Dec. at 1405, 641 N.E.2d at 364.) In that regard, the majority cites *Chicago National League Ball Club, Inc. v. Thompson* (1985), 108 Ill.2d 357, 91 Ill.Dec. 610, 483 N.E.2d 1245, and *People ex rel. County of Du Page v. Smith* (1961), 21 Ill.2d 572, 173 N.E.2d 485, in support. Clearly as the majority notes, there was a rational basis for the classifications in those cases. I believe that what was significant in determining that the legislation in those cases was not impermissibly special, however, was that the enactments embraced all those who occupied a like position to those included under the various enactments.

As has been stated, it is the Counties' argument that the act is constitutionally permissible because of the rapid growth in Du Page,

McHenry, and Kane Counties. Plaintiffs' response that Will and Lake Counties also experienced rapid growth is answered with recognition by the majority of the legislature's flexibility in making classifications. 161 Ill.2d at ___, 204 Ill.Dec at 11, 641 N.E.2d at 365.

The majority's response merely begs the question. This court is charged with the charged with the [sic] constitutional responsibility to determine whether a general law can be made applicable. We can take no refuge in the recitation of general legal principles in the avoidance of our constitutional mandate. That the legislature is given "great flexibility in addressing the different needs throughout the State" does not give the legislature carte blanche to enact impermissibile special legislation. Further, "this court cannot rule that the legislature is free to enact special legislation simply because 'reform may take one step at a time.' " (*Grace v. Howlett* (1972), 51 Ill.2d 478, 487, 283 N.E.2d 474, quoting *Williamson v. Lee Optical of Oklahoma, Inc.* (1955), 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563, 573.) Finally, the principles that presumptions are in favor of the validity of an act and that reasonable doubts are to be resolved in favor of its validity cannot serve to frustrate the exercise of our constitutional responsibility. (See *In re Belmont*, 111 Ill.2d at 386, 95 Ill.Dec. 521, 489 N.E.2d 1385.) Notwithstanding the legislature's discretionary powers, it remains the responsibility of this court to determine whether a general law is or can be made applicable. Ill.Const. 1970, art. IV, § 13.

In order for the act to survive the challenge of special legislation, it must satisfy both prongs of the two-part test as enunciated in *In re Belmont*, reasonable classification and a rational relation to the act's

purpose. Braden and Cohn, in their comparative analysis of the Illinois Constitution, provide some guidance on the issue of reasonableness of classifications. In that regard, they suggest that it is difficult to support a classification applicable to cities in excess of 500,000 if there are three large cities with populations of 468,000, 493,000, and 531,000, respectively. However, if the third city was the only one on a lake and if the purpose of the legislation was related in some way to the presence of a lake, then a classification of coverage of cities over 500,000 bordering on a lake would be a rational one. The writers further suggest that a bill applicable to cities over 95,000 but under 100,000 in population would be suspect, for there can hardly be a legitimate purpose for singling out such a narrow population spread. G. Braden & R. Cohn, The Illinois Constitution: An Annotated and Comparative Analysis 209 (1969). *See, e.g., Pettibone v. West Chicago Park Commissioners* (1905), 215 Ill. 304, 74 N.E. 387 (holding that the distinction between a park district whose limits are co-extensive with a town and a park district in the city whose limits are not co-extensive with the limits of a town is purely arbitrary and without a rational basis).

The Counties argued that Du Page, Kane and McHenry Counties are unique in that they were the fastest growing counties in the State between the years 1980 and 1987. In support of this argument, they presented evidence that between 1980 and 1987, Du Page, Kane and McHenry Counties experienced the highest percentage of population growth in the State. Additionally, the Counties presented evidence that in that same period, those three counties experienced the highest numerical population growth in the State.

Attached to the Counties' cross-motion for summary judgment are two charts. The first chart, titled "Population Change in Illinois Counties Over 100,000: 1980 To 1987," is a bar graph. The graph purports to measure numerical population growth per county in Illinois. The second chart is untitled and bears no page designation. That chart purports to measure percentages of population growth for each Illinois county from 1980 to 1988.

In my view, the Counties' evidence supports the conclusion that Lake County is similarly situated (double-digit percentage increase in population and contiguity to Cook County) to the three counties included within the scope of the act. The exclusion of Lake County from coverage under the act presents a clear example of the arbitrariness of the challenged classification.

Relying, purely for the sake of argument, on the Counties' *unauthenticated* charts, it appears that from 1980 to 1988 the three counties covered by the act experienced the following percentage increases in population growth: Du Page—15.5%, McHenry—15.7%, Kane—13.8%. For that same period, Lake County experienced a 12.5% increase. Clearly, Du Page, McHenry and Kane Counties had the greatest percentages of population growth in comparison to Lake and all other counties in the State. However, I am at a loss as to why Kane County's 13.8% increase, though greater than Lake County's 12.5% increase, is any more significant than Lake County's increase. Further, I fail to understand why Kane County's 13.8% increase compares favorably for inclusion under the act with Du Page County's 15.5% or McHenry County's 15.7%, while Lake County's 12.5% does not similarly compare with Kane County's 13.8%. I would conclude

similarly with respect to those counties' actual numerical growth for that period. (Du Page—from 658,858 to 760,800; McHenry—from 147,897 to 171,100; Kane—from 278,405 to 316,800; Lake—from 440,388 to 495,300.)

There is no *substantial* difference in population growth between Lake County and the three counties covered under the act. Accepting the rapid-growth argument, however, what possible justification can there be for excluding Lake County from coverage when its population growth is a mere 1.3% behind that of Kane County?

I am not suggesting that the inclusion of Lake County under the act would have any curative effect. The use of Lake County here is merely exemplary of the arbitrariness of the classification. Any classification must have some reasonable basis.

"A law is general not because it embraces all of the governed, but because it may, from its terms, embrace all who occupy a like position to those included." (*Bridgewater*, 51 Ill.2d at 111, 281 N.E.2d 317.) In my view, the County Motor Fuel Tax Law, which merely names Du Page, Kane and McHenry Counties as beneficiaries, creates an arbitrary classification and, therefore, violates the special legislation proscription. If, as the legislative debates suggest, the purpose of the act is to encourage economic development in the State of Illinois, it should matter little which county serves as the conduit for the benefit. A general law could be made applicable.

For the reasons stated, I dissent.

Appendix 2-1

Illinois Supreme Court
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 3, 1994

Mr. Myron M. Cherry
Cherry & Flynn
30 N. LaSalle St. S#2300
Chicago IL 60602

No. 75468 - Connie Cutinello Indv. et al. etc. appellees v. Douglas L. Whitley Director of the Illinois Department of Revenue et al. (County of Kane et al. appellants). Appeal Circuit Court (Cook).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on October 18 1994.

Supreme Court, U.S.
FILED
MAR 6 1995
OFFICE OF THE CLERK

No. 94-1182

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

CONNIE CUTINELLO, etc., *et al.*,
Petitioners,

v.

DOUGLAS L. WHITLEY, etc., *et al.*,
Respondents.

On Appeal From the Supreme Court Of
The State of Illinois
There On Appeal From The
Circuit Court Of Cook County, Illinois

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

David R. Akemann*
Kane County State's Attorney
Patricia Johnson Lord
Chief: Civil Division
D. Gregg Ingemunson
Donald B. Leist
37W777 Route 38 Suite 300
St. Charles, IL 60175
(708) 232-3500

Attorneys for the Respondent County of Kane
*Counsel of Record

ORAL ARGUMENT REQUESTED

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether Chapter 55, Section 5/5-1035.1 of the Illinois Compiled Statutes violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

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CONSTITUTIONAL PROVISION INVOLVED

Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, §1

STATUTORY PROVISIÓN INVOLVED

The state statute involved provides in part:[1]

> The County board of the counties of DuPage, Kane and McHenry may, by an ordinance or resolution adopted by an affirmative vote of a majority of the members elected or appointed to the county board, impose a tax upon all person engaged in the county in the business of selling motor fuel, as now or hereafter defined in the Motor Fuel Tax Law, at retail for the operation of motor vehicles upon public highways or for the operation of recreational watercraft upon waterways. The tax may be imposed, in half-cent increments, at a rate not exceeding 4 cents

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[1] The verbatim text of the entire statute has been lodged with the Clerk of this Honorable Court.

> per gallon of motor fuel sold at retail within the county for the purposes of use or consumption and not for the purpose of resale. The proceeds from the tax shall be used by the County solely for the purposes of operating, constructing and improving public highways and waterways, and acquiring real property and right-of-ways for public highways and waterways within the county imposing the tax . . .
>
> 55 *ILCS* 5/5-1035.1

The above section is the portion of comprehensive legislation that is being challenged by the Petitioners.

STATEMENT OF THE CASE

Respondent County of Kane (hereinafter "Respondent") adopts the "Statement of Case" set forth by Plaintiff-Petitioners (hereinafter referred to as "Petitioners") as set forth on pages 2 and 3 of their Petition for Writ of Certiorari (hereinafter referred to as "Petition").

ARGUMENT

The Petition for Writ of Certiorari to the Illinois Supreme Court in order to review its decision in *Cutinello v. Whitley*, 161 Ill.2d 409, 641 N.E.2d 360 (1994) should be denied. The statute at issue does not involve a suspect classification and does not infringe upon a fundamental constitutional right. Accordingly, on a rational-basis review, a classification comes to this Court bearing a strong presumption of validity. *Federal Communications Commission v. Beach Communications Inc.*, 124 L.Ed.2d 211, 222 (1993) (hereinafter referred to as *Beach*) *quoting Lyng v. Automobile Worker's*, 485 US 360, 370 (1988). Petitioners have the burden "to negative every conceivable basis which might support" the classification. *Beach, supra,* at 124 L.Ed.2d 211, 222 *quoting Lehnhausen v Lake Shore Auto Parts Co.* 410 US 356 (1973). Petitioners have failed to meet this burden.

A. INTRODUCTORY COMMENTS

This case is controlled by this Court's recent decision

in *Beach.*

Like the legislation reviewed in *Beach*, the statute at issue in the instant case is part of economic policy adopted by a legislative body that neither proceeds along suspect lines nor infringes upon any fundamental constitutional right. Therefore, as *Beach* instructs, the critical inquiry is whether there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach, supra,* at 124 L.Ed.2d 211, 221.

B. THE MOTOR FUEL TAX IS CONSTITUTIONAL

The rationale for the challenged legislation, which constitutes only one component of the entire package of legislation dealing with statewide transportation assistance issues (1989 Ill. Laws 86-16, hereinafter Public Act 86-16), is to provide Kane, DuPage and McHenry Counties with the option to enact a motor fuel tax to enable those counties to address traffic congestion and transportation problems which

accompanied the obvious and rapid development occurring in those counties. The Illinois Supreme Court noted that even the data presented by Petitioners supported the classification in question, stating ". . . Plaintiffs' own statistics show that the worst congestion problems exist in the northeastern part of the State. They also show that the Counties [Kane, McHenry and DuPage] rank high in terms of urban congestion based on miles of congested roadway and the cost of relieving the congestion." *Cutinello* at 161 Ill.2d 407, 422, 641 N.E.2d 360, 366.

The essence of Petitioners' argument is that because the legislature chose to use the names of specific counties, the classification in question violates the Equal Protection Clause. This reasoning ignores the principle which presumes that the legislature ". . . acted conscientiously and did their duty in making a survey of the conditions prevailing in the (counties) of the State before enacting the classification legislation." *Cutinello* at 161 Ill.2d 409, 421 N.E.2d 360, 365 *quoting In Re Belmont Fire Protection District,* at 111 Ill.2d 380, 489

N.E.2d 1385, (1986). Clearly, the Illinois Legislature could have articulated a classification in order to avoid identifying the counties by name (i.e. "those counties having a population less than 'x,' having 'x' percentage of growth within 'x' miles of a county in excess of 'x' population.") However, instead of fashioning the obscure, the Illinois Legislature chose to be clear and direct. The legislature should be commended, not penalized, for using plain language not susceptible to misinterpretation.

Petitioners also contend that the classification in question should be held unconstitutional because, in Petitioners' opinion, other counties should have been included in the classification.[2] This Court has recognized that a

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[2] Petitioners note that "the equal protection clause prevents states from arbitrarily granting privileges to politically powerful local governments or penalizing the weak or disfavored." (Petitioners' Brief, at 18.) Petitioners' argument, that Lake County was excluded from the legislation in question because it was not politically powerful, or in the converse, was politically weak or disfavored, is disingenuous. This is evident by Petitioners' own recitation of the legislative debates in which it is apparent that Lake County *was* originally included in the legislation, but at the request of Illinois legislators representing Lake County, it was deleted from the so-called "privileged group." (Petitioners' Brief, at 18.) Thus

classification statute "requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some point is a matter for legislative, rather than judicial, consideration." *Beach, supra,* at 124 L.Ed.2d 211, 223. Petitioners urge this Honorable Court to substitute their judgment for that of the Illinois Legislature.

Petitioners also indicate that, in their opinion, the inclusion of additional counties may make the legislation pass constitutional scrutiny.[3] This type of endless second-guessing

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Petitioners' contention that only the politically powerful were included in the classification they contend is unconstitutional is baseless, and their argument that equal protection was violated in excluding Lake County is contrary to the underlying principles of equal protection. Lake County specifically *rejected* the "protection" which Petitioners are so eager to bestow upon it in order to invalidate legislation they dislike.

[3] At one point in their Petition, Petitioners argue that Lake County, and possibly Will County, would be necessary, in their opinion, to make the classification constitutional. (Petitioners' Brief, at 15) Later, relying upon a study conducted by the Illinois Department of Transportation, they argue that perhaps St. Clair and Madison Counties might also be essential to a valid classification. (Petitioners' Brief, at 17)

underscores the necessity for legislative direction, not judicial intervention. As this Court unanimously held in *Beach*, "equal protection is not a license for courts to judge the wisdom, fairness or logic of legislative choices."[4] *Beach, supra,* at 124 L.Ed.2d 211, 221.

"A classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legislative governmental purpose." *Heller v. Doe,* 125 L.Ed.2d 257, 270 (1993). This Court also observed in the *Heller* case that "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Id.* at 271.

Petitioners contend that the Illinois Supreme Court's

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[4] Justice Stevens concurred in the judgment.

decision in *Cutinello* condones ". . . any speculation, even if idle or false" in upholding a classification."[5] (Petitioners' Brief, at 5, *Cutinello 94-1184*) Petitioners' rather arrogant criticism of the Illinois Supreme Court's analysis of the classification in question is wholly inappropriate in light of the principles enunciated by this Court in *Beach.*[6] In *Beach*, this Court made clear its respect for, and its deference to, legislative decisions made by state legislators most familiar with the issues and problems facing their constituency. In order to enforce this deferential posture, this Court held that ". . . legislative choice is not subject to courtroom fact-finding

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[5] "One could conceive that Chicago is the smallest city in Illinois - but it is not. One could conceive that Cook County is a rural county, but it is not." (Petitioners' Brief, at 5.)

[6] Petitioners criticize the Illinois Supreme Court for relying upon federal cases involving equal protection challenges to legislation. Petitioners themselves avoid any reliance on federal cases in their argument that the classification they challenge is violative of the Fourteenth Amendment to the U.S. Constitution. They refer to this Court's decision in *Beach* only in passing, suggesting that federal cases should not be used as a "mantra to conclude or obviate analysis of the specific legislation involved." (Petitioners' Brief, at 18.) Instead Petitioners rely heavily upon Illinois Supreme Court and appellate court cases which were decided prior to this Court's dispositive ruling in *Beach*. (Petitioners' Brief, at 11-13.)

and may be based on *rational speculation unsupported by evidence or empirical data.*" *Beach, supra,* at 124 L.Ed.2d 211, 222, (emphasis added). Thus the issue before the Illinois Supreme Court was whether that court could have found that there was *any* rational relationship, even if "unsupported by evidence or empirical data" between the classification in question and a legitimate governmental purpose.

In its analysis of this issue, the Illinois Supreme Court also relied on this Court's ruling in *Beach* for the proposition that since it could not require a legislature to articulate it reasons for enacting a statute, it would therefore be ". . . irrelevant for constitutional purposes whether the conceived reason for the challenged distinction *actually motivated* the legislature. (citations omitted) (emphasis added) Thus the absence of 'legislative facts' explaining the distinction 'on the record' has no significance in rational-basis analysis." *Beach, supra,* at 124 L.Ed.2d 211, 222.

Analyzing the challenged legislation using the principles

set forth by this Court, it is clear that the Illinois Supreme Court correctly found that the challenged classification was constitutional. Petitioners argue that the population rate of growth data supplied by Respondents below, as set forth in what Petitioners refer to as the "Fry affidavit," showed that the three counties in question had the highest *percentage* increase in population. However, if viewed in terms of absolute numbers, as opposed to percentages, Petitioners contend that the result would have been different. (Petitioners' Brief at 21.) In determining funding for transportation related issues, the *rate* of growth is arguably of far greater importance than growth in terms of actual numbers. For instance, while a population increase of 100,000 people in Cook County might result in only a 2% growth rate, that same 100,000 increase in population in Kane County would represent almost a 30% growth rate, thereby making the transportation concerns of far greater magnitude. While Petitioners argue that the legislature should have used different reasoning in arriving at

the classification in question, this Court in *Beach* made it clear that "[T]he assumptions underlying these rationales may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review to 'immunize' the congressional choice from constitutional challenges." *Beach, supra,* at 124 L.Ed.2d 211, 225 *quoting Vance v. Bradley,* 440 U.S. 112, (1979).

Petitioners also argue that "even supposing that the Counties have selected the appropriate measure of 'growth' . . . nothing in the Counties' argument shows that its data was available to the General Assembly when Public Act 86-16 was enacted or that the data had even been prepared by that time." (Petitioners' Brief, at 22.) It is *irrelevant*, for constitutional purposes, whether the conceived of reason *actually* motivated the legislature, and since legislative facts explaining the reason for legislative distinctions are *not* required, Petitioners' argument that there was no evidence that the data in question was available to the General Assembly when it enacted Public

Act 86-16 is meritless.

This Court's *Beach* analysis was preceded by its holding in *Kadrmas v. Dickenson Public Schools,* 487 U.S. 450, (1988). There this Court stated:

> We are not bound by explanation of the statute's rationality that may be offered by litigants or other courts. Rather, those challenging the legislative judgement must convince us 'that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'

Id. at 487 U.S. 450, 463.

The jurisprudence of this Court clearly indicates that under the rational-basis test, the legislation in question is constitutional.

CONCLUSION

The decision of the Illinois Supreme Court in *Cutinello* in no way conflicts with applicable decisions of this Court

involving the Equal Protection Clause of the Fourteenth Amendment. The Illinois Supreme Court correctly followed each principle of law enunciated by this Court. Therefore, Petitioners' Petition for Writ of Certiorari should be denied.

Dated: March 6, 1995

Respectfully submitted,

DAVID R. AKEMANN
KANE COUNTY STATE'S ATTORNEY
37 W 777 Route 38, Suite 300
St. Charles, IL 60175
(708) 232-3500

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No. 94-1182

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CONNIE CUTINELLO, etc., et al.,

Petitioners,

v.

DOUGLAS L. WHITLEY, etc., et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

RESPONDENTS COUNTY OF DuPAGE AND COUNTY OF McHENRY'S BRIEF IN OPPOSITION

HON. GARY W. PACK
MARY KAY WALTER
Counsel of Record
McHenry County State's Attorney's Office
2200 N. Seminary Avenue
Woodstock, Illinois 60098
(815) 334-4159

Attorneys for Respondents COUNTY OF McHENRY

HON. ANTHONY M. PECCARELLI
Counsel of Record
GEORGE J. SOTOS
MARK J. SHANAHAN
PEGGY M. HEALY
DuPage County State's Attorney's Office
505 N. County Farm Road
Wheaton, Illinois 60187
(708) 682-7598

Attorneys for Respondents COUNTY OF DuPAGE

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTION PRESENTED

I.

WHETHER ILLINOIS' ADOPTION OF A COUNTY GAS TAX TO HELP FUND TRANSPORTATION PROJECTS IN CERTAIN RAPIDLY GROWING AND CONGESTED NORTHEASTERN ILLINOIS COUNTIES IS SUBJECT TO INVALIDATION UNDER THE EQUAL PROTECTION CLAUSE SIMPLY BECAUSE THE CLASSIFICATION IS ALLEGEDLY UNDERINCLUSIVE.

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A. Standard of Review

This Honorable Court's review of the Illinois legislature's decision to permit certain designated Illinois counties to impose a tax of up to four cents a gallon on gasoline sales is "especially deferential." *Nordlinger v. Hahn*, 112 S.Ct. 2326, 2332 (1992). "[L]egislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *Id.* at 2331 (*citing, McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961)). In the context of an equal protection challenge to a legislative classification, that presumption can be rebutted only through a showing that the "classification [does not] rationally further a legitimate state interest." *Nordlinger*, 112 S.Ct. at 2331-32. The identification of a "plausible reaso[n]" for the legislative action terminates the court's inquiry. *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). In order to defeat a statute on the basis of illegal classification, the plaintiff bears the burden "to negative every conceivable basis which might support" the rationality of the classification. *F.C.C. v. Beach Communications, Inc.*, 113 S.Ct. 2096, 2102 (1993) (*citing, Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). "This standard of

review is a paradigm of judicial restraint." *Beach Communications*, 113 S.Ct. at 2101.[1]

B. Petitioners' Contention that the Legislative Classification is Underinclusive does not Render the Classification Arbitrary or Irrational

In light of the very narrow avenue of review, the Illinois Supreme Court had little difficulty identifying a "plausible policy reason" underlying the enabling legislation. *See Nordlinger*, 112 S.Ct. at 2332. Specifically, the Court acknowledged, and indeed, Petitioners do not dispute, that the impact of population growth on transportation and traffic conditions in urban areas constitutes an entirely valid justification for legislative classification (Pet. App. pp. 7-8 (*citing, People ex rel. Curren v. Wood*, 391 Ill. 237, 62 N.E.2d 809 (1945)).

While Petitioners thus concede the propriety of *a* legislative classification in order to fund transportation projects in congested Illinois counties, they have insisted, nonetheless, that the classification consisting of DuPage, Kane and McHenry Counties is not rationally related to the legislature's traffic and population concerns. Initially, Petitioners make much of the legislature's decision to identify the Respondent Counties by name, rather than by a more traditional method, such as size or location (Pet. pp. 3, 6, 8, 13-16, 19 n.6). Nowhere, however, do Petitioners cite any authority invalidating legislation simply because the beneficiaries of the legislation were referred to by name. Indeed, Petitioners' suggestion that classifica-

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[1] Petitioners make no claim that the classification they challenge implicates a "fundamental right" or "inherently suspect characteristic" which would trigger more exacting review. *See Nordlinger*, 112 S.Ct. at 2331.

tion by name amounts to an equal protection violation is undermined by the proposition that the legislature need not articulate or disclose the basis for a classification, and that a classification will be sustained so long as it can be justified under any conceivable rational basis. *See Beach Communications*, 113 S.Ct. at 2102.

Moreover, legislative classification by name is hardly unprecedented, particularly in the present context. In Illinois itself, the legislature created the "Metro East Mass Transit District" (70 ILCS 3610/1) and the "Regional Transportation Authority" (70 ILCS 3615) in response to rapid population growth in two specific areas of the state. The Metro East Mass Transit District was restricted to three designated downstate counties (70 ILCS 3610/2(i)) while the Regional Transportation Authority was limited to six named counties in northeastern Illinois (70 ILCS 3615/1.02). *See Hoogasian v. Regional Transportation Authority*, 317 N.E.2d 534 (Ill. 1974) (upholding constitutionality of statute). Other states have similarly rejected the notion that a legislative classification violates principles of equal protection simply because the legislature designated by name the county to be benefitted. *See, e.g., Atlantic City Parking Auth. v. Atlantic County*, 434 A.2d 676 (N.J. 1981).

Turning from form to substance, the gist of Petitioners' contention is that the classification violates principles of equal protection primarily because Lake and Will Counties were excluded from the legislation. At the same time, Petitioners repeatedly and vehemently denigrate the Illinois Supreme Court for rejecting that contention on the basis of "unproven assertion[s]", "intellectual what-if[s]", and "idle speculation" (Pet. p. 5).

Petitioners' misplaced ire is best explained by their refusal to grasp the proper role of the judiciary and the

nature of its task in reviewing a legislative classification against an equal protection or special legislation challenge. As repeatedly emphasized by this Court, the judiciary's task is simply to ensure that a particular classification is not arbitrary, or irrational; it need not determine that the classification was mathematically precise or perfectly inclusive. *See, e.g., Beach Communications*, 113 S.Ct. 2101-02 (1993). Moreover, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 2102. Accordingly, any reliance by the Illinois Supreme Court upon "unproven assertions" and "speculation", would have been entirely consistent with the proper scope of its judicial function, so long, of course, as such speculation was rational.

In this case, the position taken by Petitioners, when considered in conjunction with the information they provided to the lower courts, defeats any suggestion that the classification they challenge is irrational or arbitrary. Indeed, in assessing whether the classification appeared rational, the State Supreme Court correctly noted that even the "Plaintiffs do not dispute the rapid population growth in the northeastern part of the state" (Pet. App. p. 10). The Court similarly pointed out that Petitioners' own evidence showed that "the Counties rank high in terms of urban congestion" (Pet. App. pp. 11-12). In light of Petitioners' own submissions, and the stringent limits on its scope of review, the Illinois Supreme Court properly resisted Petitioners' attempts to embroil it in exacting fact-finding on whether DuPage, McHenry, and Kane Counties were, in fact, the *only* counties deserving of the additional tax.

A proper understanding of the appropriate scope of review similarly dispels Petitioners' oft repeated contention that

the Illinois Supreme Court improperly relied on an affidavit concerning population growth rates in various Illinois counties which was proffered by Respondents in the Circuit Court of Cook County (Pet. pp. 4-6, 8, 21-27). That affidavit, as Petitioners correctly point out, was stricken by the Circuit Court because it failed to satisfy the State of Illinois' standards governing admissibility of evidence. Indeed, even the State Supreme Court noted that the affidavit contained "unauthenticated statistics" (Pet. App. p. 10).

Whether the affidavit was admissible as evidence was entirely irrelevant, however, to the Court's task. Because "a legislative choice is not subject to courtroom fact-finding" (*Beach Communications*, 113 S.Ct. at 2102), the classification could not properly be struck down simply because the Counties failed to present evidence in support of the classification's reasonableness. As the lower Court reasoned, "it is plaintiffs' burden to show that a classification is unreasonable, not the Counties' burden to show that the classification is reasonable" (Pet. App. p. 11).

Moreover, the Illinois Supreme Court's opinion does not suggest that the justices relied on the previously stricken affidavit in concluding the classification survived deferential scrutiny. As indicated above, the Court was most persuaded by the absence of any challenge to the statute's underlying purpose and by Petitioners' concession that each of the Respondent Counties shared common characteristics warranting their inclusion in the chosen class.

Even if it did consider the affidavit, the State Supreme Court could not legitimately be faulted for according Mr. Fry's conclusions whatever weight it deemed appropriate regardless of whether his affidavit satisfied standards of admissibility. In assessing whether the classification was

"rational", the Court could conceivably have relied on a virtually limitless array of sources of information including common sense, life experiences, judicial notice, prior cases, suggestions by counsel, and proffered evidence, whether admissible under traditional evidentiary standards or otherwise. Indeed, in *Beach Communications, Inc.*, the rational basis for a disputed classification was first suggested by former D.C. Circuit Court of Appeals Chief Judge Abner Mikva in a concurrence based wholly upon his own perceptions of the cable television industry. 113 S.Ct. at 2103. *See also Beach Communications, Inc. v. F.C.C.*, 959 F.2d 975, 988-91 (D.C. Cir. 1992). In espousing his theory, Chief Judge Mikva reasoned that the presumption of a classification's validity may be "sustained by justifications in or out of the record" because equal protection is satisfied so long as "any state of facts reasonably *may be conceived* to justify" the distinction. *Id.* at 989 (internal citations omitted) (emphasis in original). That being the case, it is inconsistent for Petitioners to seek reversal in this case because the perceptions of some or all of the lower court justices may have been influenced by information contained in the affidavit.

The broad deference accorded the legislature in the context of an equal protection challenge to state taxation statutes does not, as declared by Petitioners, mean that "*no legislation could ever be invalidated*" under the Illinois Supreme Court's "twisted" view of the equal protection clause (Pet. p. 4) (emphasis in original). For example, a showing of irrationality or arbitrariness could conceivably be made through an allegation that one or more of the beneficiaries of a piece of legislation obviously lacks key characteristics consistent with the justifications advanced in support of the legislation. In the present context, an allegation that one or more of the Respondent

counties was, in fact, one of the slower growing, and lesser congested counties in northeast Illinois, as opposed to one of the fastest growing and most congested, would presumably be sufficient to raise questions as to the rationality of the classification.

Petitioners do not, and cannot contend, that any of the classified counties lack population or congestion problems of a magnitude warranting their inclusion in the class of counties to be benefitted through the gas tax. Rather, Petitioners contend that their statistics and studies suggest that certain other counties should also have been included in the class. Specifically, Petitioners rely heavily on an Illinois Department of Transportation report entitled *Lifelines to the Economy*, which concluded that the ideal class of counties to be benefitted by a gas tax would include Lake and Will Counties in addition to DuPage, McHenry and Kane Counties in northeastern Illinois (Pet. pp. 7, 16-17). The report also opines that the classification should include St. Clair and Madison Counties, both of which are located in the far southern part of the state (Pet. pp. 7, 16-17).

Petitioners' attempt to substitute the suggestions of the Illinois Department of Transportation for the will of the Illinois legislature threatens to turn the legislative process on its head, and convert the judiciary into a super-legislature. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Legislatures are not bound to adopt as gospel the suggestions they receive from state agencies or from any other source under threat that a court may later invalidate legislation if it does not mirror the recommendations. Clearly the Illinois Department of Transportation may have an interest in securing funds for a broader class of counties than may be feasible from the far broader perspective employed by a legislative body.

Moreover, as indicated above, the *Lifelines* study relied on by Petitioners actually supports the Illinois Supreme Court's conclusion that the challenged classification was rationally based. According to Petitioners, the report concluded that, out of one hundred and one (101) Illinois counties, only seven should be given the option to impose a gas tax, and three of those seven were the Counties ultimately chosen by the legislature (Pet. pp. 16-17). Utilizing Petitioners' own "evidence", therefore, the General Assembly could have easily concluded that the named counties were an appropriate class in light of the purposes of the enabling legislation.

Petitioners put a different spin on the *Lifelines* study, suggesting that, because it recommended the inclusion of particularly Lake and, to a lesser extent, Will Counties, any classification exempting those counties must be irrational. Once again, however, Petitioners' own "evidence" suggests a rational basis for the exclusion of Lake County. Specifically, Petitioners point to statements made by Lake County legislators supporting the enabling statute expressly "*because it excluded* Lake County (Pet. p. 18) (emphasis in original). Notably, one of those representatives explained that he wanted Lake County exempted because "we're on the border of Wisconsin" (Pet. p. 18, *citing House Transcript, Statement of Representative John Matijevich*, June 30, 1987). Matijevich's statement would suggest a rational basis for exempting Lake County, that being the concern that drivers might fuel up across the state line in order to avoid the additional tax. Accordingly, it would be quite rational to conclude that, at least in Lake County, any additional revenue generated by the gas tax would be diluted by the loss of gas customers, and that Lake County gas distributors might, therefore, be more damaged by the tax than those in the Respondent Counties.

Finally, to the extent Petitioners insist the classification is irrational or arbitrary because Will County was excluded, their contention is misdirected. As indicated above, "the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Nordlinger*, 112 S.Ct. 2326 at 2332 (*quoting*, *Williams v. Vermont*, 472 U.S. 14, 22 (1985). Moreover, as aptly noted by the Illinois Supreme Court, "[c]lassification 'requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some point is a matter for legislative, rather than judicial, consideration' " (Pet. App. p. 10 (*quoting*, *F.C.C. v. Beach Communications*, 113 S.Ct. at 2102)). Accordingly, the classification cannot be invalidated simply because another county or other counties would also have benefitted from inclusion. If Petitioners wish to have Will County included in the enabling legislation, that request should be addressed to the legislature. In that respect, it is noteworthy that Petitioners have never contended that any representative of Lake or Will Counties, or any other excluded County, have complained about not being included in the enabling legislation.

CONCLUSION

The Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

HON. ANTHONY M. PECCARELLI
Counsel of Record
GEORGE J. SOTOS
MARK J. SHANAHAN
PEGGY M. HEALY
DuPage County State's
Attorney's Office
505 N. County Farm Road
Wheaton, Illinois 60187
(708) 682-7598

Attorneys for Respondents
COUNTY OF DUPAGE

HON. GARY W. PACK
MARY KAY WALTER
Counsel of Record
McHenry County State's
Attorney's Office
2200 N. Seminary Avenue
Woodstock, Illinois 60098
(815) 334-4159

Attorneys for Respondents
COUNTY OF MCHENRY